

4th Assembly of Planners Symposium
February 6, 2019

Overview of Drafting Administrative Rules and Regulations

Presenter:

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Presented By:
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Training Objectives:

1. Participants will gain an overview of the general responsibilities and requirements of drafting administrative rules in order to meet statutory mandates, and will be able to identify the primary steps to take to draft and enact those rules.
2. Participants will know the importance of using plain language and writing rules that are easy to understand and easy to follow.
3. Participants will better understand basic principles of rule drafting, and be better able to fulfill those duties when needed.



GENERAL LEGAL MATTERS



Sources of law:

Laws and Regulations that Govern Drafting of Guam's Administrative Rules and Regulations ("GAR") (i.e., Rules about how to draft rules!):

1. The Organic Act: Establishes government of Guam.
Authorizes legislature to enact laws.
2. The Administrative Adjudication Law (AAL): Title 5, Guam Code Annotated, Chapter 9, Article 3, Rule-Making Procedures, §§ 9300 – 9312.
3. The Compiler of Laws: Title 1, Guam Code Annotated, Chapter 16, §§ 1606 and 1610; and Title 1, GAR, Chapter 1

Attorney General review of your rule drafting:

The Office of the Attorney General reviews your draft rules for legality under the Administrative Adjudication Law (AAL).

This is usually the first time a lawyer reads your rules. Our review of your rules usually consists of the following:

- (1) the legality, constitutionality, and consistency with other rules;
- (2) the existence of statutory authority and the correctness of the citation of statutory authority;
- (3) the clarity, simplicity of expression, possible ambiguity, and possibility of misapplication of your rules;
- (4) your compliance with the AAL.

If acceptable, an assistant attorney general will approve the final draft and the Attorney General will sign it. If minor revisions are needed, the assistant attorney general will contact you to discuss revisions, deletions, additions, etc. If there is an enormous problem with the rules, the Attorney General might reject the entire rule set in writing; in which case it may be necessary to schedule a meeting to discuss these problems.





STEP ONE: AUTHORITY TO MAKE RULES



Authority to promulgate administrative rules:

1. Authority to write rules must be specifically granted to each agency by the Legislature by statute.

When an agency adopts rules or regulations, it is exercising a legislative function which has been delegated to it by the Legislature.

This means: 1) The agency may not enact rules which conflict with any statutes which create either the agency or the programs which it administers; AND

2) the agency cannot give itself additional powers in its rules---i.e., the agency cannot exceed the statutory authority.

Authority to promulgate administrative rules:

2. Don't go outside the box!

Generally, the Legislature will give an agency certain broad goals to pursue and allow the agency to establish its means of reaching these goals. However, this means that your rules must be reasonable and within those goals.

The rules must be reasonably calculated to reach the policy goals the Legislature has established.

E.g., regulating "Recreational activities" vs. "scientific research activities."

Who should write the rules?

1. Anyone can draft rules for an agency.
2. The person drafting the rules should be knowledgeable and familiar with the subject matter of the rules.
3. The person drafting the rules should have the best interests of the government of Guam and the agency in mind. (Don't trust just anyone!)
4. The Director of the agency must review and approve the rules.

Why might it be better to have an agency employee draft the rules?

- Simply for the sake of control!
- There should be one person who is the primary drafter, but he or she may have help
- The agency Director should choose the primary drafter

What skills or experience are needed?

- know the procedures
- understand that area of the law generally
- able to understand enforcement
- able to write
- able to accomplish the goals of the agency





STEP TWO: LABELING AND FORMATTING YOUR RULES



Comply with the guidance of the Compiler of Laws:

Pursuant to 5 GCA § 9303(a), all rules are required to be "in a form approved by the Compiler of Laws."

In order to help agencies format their rules, the Compiler of Laws has issued "Guidance for Formatting Rules and Regulations (GAR)"

See Presentation Handout #1.

Follow the instructions in the Compiler's Guidance.





Supreme Court of Guam COMPILER OF LAWS

Guam Law Library, 141 San Ramon Rd., Hagåtña, Guam 96910-5174
Telephone: (671) 477-7623 and 472-8062 Facsimile: (671) 472-1246



F. PHILIP CARBULLIDO
Chief Justice

GERALDINE AMPARO CEPEDA
Compiler of Laws

GUIDANCE FOR FORMATTING RULES AND REGULATIONS (GAR)

The Office of the Compiler of Laws is statutorily mandated to “[u]ndertake the publication of the continuing Administrative Rules and Regulations” of Guam. 1 GCA § 1602(c). The authority for the rule-making procedures of government of Guam agencies, departments, and other entities are set forth in Title 5, Guam Code Annotated, Chapter 9, Article 3, entitled “Rule-making Procedures.” As part of this process, the rules are statutorily required to be “in a form approved by the Compiler of Laws.” 5 GCA § 9303(a).

To assist government of Guam agencies, departments, and other entities, with the process of publishing submissions for including in the Guam Administrative Rules & Regulations (GAR), the Office of the Compiler of Laws has prepared this document to give guidance in the drafting process. It is strongly encouraged that those responsible for drafting rules and regulations review the recommendations and utilize the standard format herein, which was approved by the Guam Code Advisory Commission on June 21, 2005. Compliance with the recommended format will be de facto indication that the submission is in a format approved by the Compiler of Laws.

Recommendation 1

Please compose GAR sections according to the diagram below. It is helpful to know that the GAR is divided into the following subdivisions in descending order:

Title (mandatory)

Division (if necessary)

Part (if necessary)

Chapter (mandatory)

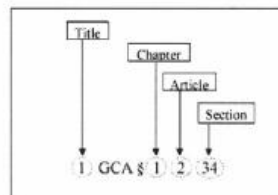
Article (if necessary)

Section (mandatory)

Subsection (if necessary)

Note that Title, Chapter and Section designations are required for any codification scheme. Division, Part and Article designations are sometimes not used in particular codification schemes. We recommend that whenever possible, Article designations be used. The following diagram shows an example of the general codification scheme for the GCA, which similarly applies to the GAR:





Recommendation 2

Please draft GAR sections according to the example below and identify subsections in the following format.

§ 1101. Name or Title of Section.

In the section title, the first letter of each major word is capitalized. Do not capitalize minor words such as conjunctions and articles (e.g. and, but, or, the, a, etc.). The text of the section should be written as shown in this example.

(a) First subsection. The first subsection (if any) is designated with small letters in parentheses.

(1) Second subsection. The second subsection (if any) is designated by Arabic numerals in parentheses.

(A) Third subsection. The third subsection (if any) is designated by large capital letters in parentheses.

(i) Fourth subsection. The fourth subsection (if any) is designated by small Roman numerals in parentheses.

(aa) Fifth subsection. If necessary, a fifth subsection is designated by double lower case letters in parentheses and the cycle repeats as follows.

(1) Sixth subsection.

(AA) Seventh subsection.

(i) Eighth subsection.

Recommendation 3

Please use Microsoft Word for creating new legislative documents. The Compiler's Office now uses Microsoft Word exclusively for processing the GAR. Legal publishers such as Lexis and West require transmittal of Word files. Use of MS Word will minimize glitches and errors caused by conversions of files created with other word processing software such as WordPerfect.

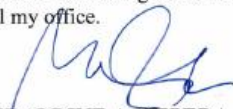
Recommendation 4

Please use Times New Roman font in documents. Times New Roman seems to be used universally and is a true-type font necessary for embedding in documents to be published. We use this font exclusively in all GAR documents.

Recommendation 5

When assigning a code section number to a new statutory addition and you are unsure of whether the desired code section number is vacant and available, please call our office.

Thank you for considering these recommendations. Please note that the suggestions herein are not necessarily hard and fast rules. There may be occasions requiring deviation from any standard formatting scheme. If you have any questions or comments, please do not hesitate to call my office.



GERALDINE A. CEPEDA

Figure out where your rules fit in the GAR:

How do I number my rules?

1 GAR § 1106. "The Guam Administrative Rules and Regulations are arranged by subject. Twenty- five (25) major parts, each indicated as a title, bring together regulations on related subjects. ...

(1) If you know the name of the agency whose regulations you wish to find, consult Table 1, Alphabetical Index of Agencies. It will show you the title in which the regulations of that agency are printed and the section and page with which they begin.

(2) If you know only the general subject concerning which you desire information, consult the Summary of Contents, Title and Chapter Headings for the Guam Administrative Rules and Regulations. It will show you the general subject matter contained in each title. By noting the list of chapters and Subchapter, you will find the name of an agency whose regulations are likely to contain the desired material."

Call the Compiler if you have questions about where your Rules should go in the GAR! She can help!



Use the correct citation format:

There is a rule on how to format your proposed rule citations!

1 GAR § 1104. How to Cite.

"Cite by Title, "GAR", Division and Section number."

1 GAR § 1106(a) "Within each title, in descending order come chapter, subchapter, part and section. In some titles there are also divisions. Each title is independently numbered. The first section in Title 1 is numbered "1101". The sections, thereafter, run consecutively through the end of each titles except that gaps may be left for expansion. A new title will begin §1100, or §1000, or §1101, similar to the Guam Code Annotated."

For example: 2 GAR, Div. 4 § 11108 refers to section 11108 of the Guam Procurement Regulations, located in Chapter 11, Division 4, of Title 2 of the GAR.

DO NOT use the Guam Code statutes as your rule citations. They are not the same.





STEP THREE: DRAFTING YOUR RULES



Initial Drafting Consideration: Keep it Simple

The most important part of drafting is simplicity. Rules should be easy to find. Rules should be easy to read and easy to understand. Making an outline for your Rules before writing them can help.

Drafting:

Drafting Step One:

Create your title and put it in capitals in the middle of the page.

Drafting:

Drafting Step Two:

Create a Table of Contents.

Drafting:

Drafting Step Three:

Give each rule a title: every rule should have a short title that ends with a period. This title is called a "heading." The heading identifies the subject of a rule and summarizes the content of the rule for the Table of Contents in order to make the rule easy to find.

The heading must be identical in both places it appears: in the Table of Contents; and in the rule itself.

Example Heading: 1 GCA § 720. Headings Have No Effect.

Title, division, part, chapter, article and section headings and tables of contents do not in any manner affect the scope, meaning, or intent of the provisions of this Code.

Drafting:

Drafting Step Four:

Write your first rule: this should be a simple introductory statement of what the regulations are called and what they are intended to do.

Make sure you include: (1) a statement of where your agency gets the authority to promulgate the rules; (2) the name of the rules; and (3) the general purpose and intent of the rules.

Drafting:

Drafting Step Five:

Write your second rule: this rule should consist of a statement of which rules and regulations are being repealed or amended, if any.

Note: This rule can be combined with the first rule, but you may also want to include a rule on interpretation here. If you have any rules concerning the general impact of your rules, this is probably the best place to put them.

Drafting:

Drafting Step Six:

Write your third rule: this is the definition rule. It should contain a list of important words with their definitions. Use quotation marks to indicate the word that is being defined. You should always define technical terms or terms of art.

Note: avoid unnecessary definitions. A word will have its plain and ordinary meaning unless your rules give it a special definition.

Drafting:

Drafting Step Seven:

Write the main rules: these are the substantive rules that tell people what they can and can't do.

Drafting:

Drafting Step Eight:

Write your last rule: it is a good idea to draft this rule as a severability clause for your rules.

Example language: "If any rule or part of a rule is found to be inconsistent with the provisions of a Public Law or the Guam Code Annotated on the same subject, the provisions of the Public Law or the Guam Code Annotated shall govern."

Pointers on Drafting Valid Rules:

Factors that determine the validity of your rules:

There are approximately five basic requirements for an administrative rule to be valid. You should be generally aware of these requirements in order to avoid rejection of your rules.

However, you should let tougher questions on validity be answered by the Office of the Attorney General.

Pointers on Drafting Valid Rules:

Factor One: The agency's regulations must not be arbitrary or unreasonable.

This means that what the agency requires of the public must be reasonably related to the policy goal of the Legislature.

Example: the Director of DPHSS could require all restaurants to keep their restrooms clean because that is a requirement reasonably related to the stated goal of P.L. 15-96, which is to protect the public's health. The Director could not, however, prohibit restaurants from using video games as amusement devices because video games are irrelevant to the public health.

Pointers on Drafting Valid Rules:

Factor Two: an agency cannot charge fees unless a statute has specifically given the agency authority to charge a fee.

Example: P.L. 15-96: "Form, Duration and Charges for Permit and Annual Renewal.

"The form of the permit shall be prescribed by the Director.... The fee for the permit shall be determined by the Director by regulation and shall be collected by him."

Also, if you intend to charge a fee for something, the amount of the fee must be clearly stated in your rules.



Pointers on Drafting Valid Rules:

Factor Three: An agency cannot create or punish crimes!

This means that the agency cannot either declare something to be a crime or punish a certain act as if it were a crime in their rules.

Thus, the rules cannot declare that someone may be found guilty of a misdemeanor or felony for doing a certain act; nor can the rules prescribe jail sentences. Only the Legislature can do that.

Pointers on Drafting Valid Rules:

Factor Four: No agency can make a rule that deprives any person of constitutional rights.

This means that the agency cannot make a rule that contradicts any of the rights granted by the United States Constitution.

There are many rights given to citizens by the U.S. Constitution. If you have doubts, consult an Assistant Attorney General. However, try to avoid making classifications based on race, religion, or gender and don't make regulations that infringe on the freedom of speech. Also, don't write rules that allow any of these particular rights to be taken away without a chance to be heard.



Pointers on Drafting Valid Rules:

Factor Five: No agency can make a rule that gives it extra powers or authority.

This means that the agency can only write rules that give it the administrative means and methods of doing its duties, as those duties are set forth by the Legislature. Don't try to enlarge your agency's power by way of rule-making.



STEP FOUR: FOLLOW THE AAL TO HAVE YOUR RULES APPROVED

AAL Process:

Major AAL Process Requirements:

1. Draft an Economic Impact Statement (EIS) or a Preliminary Cost Assessment (PCA). This is a statement that addresses whether the cost of the proposed rules is estimated to be more or less than \$500,000.00. One or the other is required for all proposed rules.

See Presentation Handout #2.

AAL Process:

Major AAL Process Requirements:

2. Comply with all Public Notice and Hearing Requirements. Give 10 days' notice of the public hearing in a newspaper. Record the hearing and make a transcript. This is required for all proposed rules.
See Presentation Handout #2.

AAL Process:

Major AAL Process Requirements:

3. Obtain proper agency or board approval of the rules. This is required for all rules.
See Presentation Handout #2.

AAL Process:

Major AAL Process Requirements:

4. Transmit the rules to the Governor for approval. Include the entire record of the rules. This is required for all rules. See Presentation Handout #2.

AAL Process:

Major AAL Process Requirements:

5. Transmit the rules to the Attorney General for approval. Include the entire record of the rules. This is required for all rules.

See Presentation Handout #2.

AAL Process:

Major AAL Process Requirements:

6. Transmit the rules to the Speaker of the Legislature.

The subject line of the Transmittal Letter shall say: "This is a Transmittal to I Liheslaturan Guåhan of Proposed Rules and Regulations pursuant to the Administrative Adjudication Law."

Include the entire record of the rules. This is required for all proposed rules.

See Presentation Handout #2.

AAL CHECKLIST FOR ADOPTION OF GUAM ADMINISTRATIVE RULES

- ____ 1. Check to make sure that either the Guam Legislature or some federal law has delegated authority to the agency or board to adopt regulations.
- ____ 2. Check for proper rule numbering and format in accordance with the Compiler of Law's rule citation format. 5 GCA § 9303(a)(1).
- ____ 3. Draft regulations. They must be consistent with:
 - ____ a. The agency's or board's enabling legislation.
 - ____ b. Any GovGuam statutes affecting or creating agency's programs.
 - ____ c. Any federal statute or regulation creating or affecting your program.
- ____ 4. Draft either the Economic Impact Statement (EIS) or the Preliminary Cost Assessment (PCA) and have it available for public inspection prior to the public hearing. 5 GCA § 9301(d), (e), (f), (g), (h), (i), and (j).
- ____ 5. Public notice of your hearing must be given in a newspaper of general circulation in Guam (the *Pacific Daily News* or *Marianas Variety*) at least ten (10) calendar days before the date of your hearing. 5 GCA § 9301(a). Contents of this notice must include:
 - ____ a. Date, hour, and place of the public hearing. 5 GCA § 9301(a).
 - ____ b. A statement describing the subject matter of the regulations. 5 GCA § 9301(a).
 - ____ c. A statement that at least 5 copies of the agency's proposed regulations are on file at your agency's office where it may be examined by any interested member of the public AND that copies of the proposed rules are also available on your agency's website. 5 GCA § 9301(a).
- ____ 6. Public hearing is conducted by the agency. Testimony by any interested party must be heard, given consideration, and recorded. 5 GCA §§ 9301(b) and 9303(a)(2), (3), and (4).
- ____ 7. A transcript of the public hearing must be prepared. 5 GCA § 9303(a)(2), (3), and (4).
- ____ 8. Agency approval of final draft of regulations with any changes made subsequent to the public hearing may take place any time after public hearing---either through Director approval or Board approval through resolution or meeting minutes. 5 GCA § 9303(a)(2), (3), (4), and (b).
- ____ 9. Formal referral to the Governor of Guam. 5 GCA § 9303(a)(2). Contents should include:
 - ____ a. A short cover memo containing:
 - ____ 1. Reference to statutory grant of authority.
 - ____ 2. Reference to any other applicable GovGuam or federal statutes, regulations or executive orders.
 - ____ 3. A certification of the record for the proposed rules. 5 GCA § 9303(a)(2).
 - ____ 3. Request for policy review under the AAL. 5 GCA § 9303(a)(2).
 - ____ b. A printed copy of the proposed regulations and an electronic copy in both pdf and word formats. 5 GCA § 9303(a)(2).
 - ____ c. A printed copy of the entire record and an electronic (pdf.) copy of the entire record, 5 GCA § 9303(a)(2), including:
 - ____ 1. Director memorandum or Board Meeting Minutes or resolution approving the proposed rules. 5 GCA § 9303(a)(2).
 - ____ 2. A copy of the public notice. 5 GCA § 9303(a)(2).
 - ____ 3. A copy of the EIS or the PCA. 5 GCA § 9303(a)(2).
 - ____ 4. The transcript of the public hearing. 5 GCA § 9303(a)(2).
- ____ 10. Formal approval by the Governor. 5 GCA § 9303(a)(2). Contents should include:
 - ____ a. Approved version of the proposed rules.
 - ____ b. Written Memorandum approving the rules, signed by the Governor.



- ____ 11. Formal referral to the Attorney General. 5 GCA § 9303(a)(3). Contents should include:
- ____ a. A short cover memo signed by the Director, containing:
 - ____ 1. Reference to statutory grant of authority.
 - ____ 2. Reference to any other applicable GovGuam or federal statutes, regulations or executive orders.
 - ____ 3. A certification of the record for the proposed rules. 5 GCA § 9303(a)(3).
 - ____ 3. Request for review of constitutionality and legality under the AAL and all applicable statutory authority, laws, regulations, or Executive Orders. 5 GCA § 9303(a)(3).
 - ____ b. A printed copy of the proposed regulations and an electronic copy in both pdf and word formats. 5 GCA § 9303(a)(3).
 - ____ c. A printed copy of the entire record and an electronic (pdf.) copy of the entire record, including: 5 GCA § 9303(a)(3).
 - ____ 1. Director's Memorandum or Board meeting minutes or resolution approving the proposed rules. 5 GCA § 9303(a)(3).
 - ____ 2. A copy of the public notice. 5 GCA § 9303(a)(3).
 - ____ 3. A copy of the EIS or the PCA. 5 GCA § 9303(a)(3).
 - ____ 4. The transcript of the public hearing. 5 GCA § 9303(a)(3).
 - ____ 5. Governor's written approval. 5 GCA § 9303(a)(2), and (3).
- ____ 12. Formal approval by the Attorney General. Contents should include:
- ____ a. Final approved version of the proposed rules.
 - ____ b. Written memorandum approving the rules, signed by the Attorney General.
- ____ 13. Filing with the Speaker of the Legislature. 5 GCA § 9303(a)(4). Contents should include:
- ____ a. A short cover memo signed by the Director, containing:
 - ____ 1. The statement: **"This is a Transmittal to I Liheslaturan Guåhan of Proposed Rules and Regulations pursuant to the Administrative Adjudication Law."** 5 GCA § 9303(a)(4).
 - ____ 2. Reference to the statutory grant of authority and any other applicable GovGuam or federal statutes, regulations or executive orders.
 - ____ 3. A certification of the record for the proposed rules. 5 GCA § 9303(a)(4).
 - ____ b. A printed copy of the proposed regulations and an electronic copy in both pdf and word formats. 5 GCA § 9303(a)(4).
 - ____ c. A printed copy of the entire record and an electronic (pdf.) copy of the entire record, including: 5 GCA § 9303(a)(4).
 - ____ 1. Director's Memorandum or Board meeting minutes or resolution approving the proposed rules. 5 GCA § 9303(a)(4) and (b).
 - ____ 2. A copy of the public notice. 5 GCA § 9303(a)(4).
 - ____ 3. A copy of the EIS or the PCA. 5 GCA § 9303(a)(4).
 - ____ 4. The transcript of the public hearing. 5 GCA § 9303(a)(4).
 - ____ 5. The Governor's written approval. 5 GCA § 9303(a)(4).
 - ____ 6. The Attorney General's written approval. 5 GCA § 9303(a)(4).

____ 14. The Proposed rules shall be referred to the legislative committee with oversight of the subject matter, and that committee or the Committee of the Whole shall conduct one (1) or more public hearings on the proposed rules within seventy-five (75) calendar days from the date of filing of the rules with the Speaker. 5 GCA § 9303(b).

____ 15. 90 days after filing with the Speaker, the regulations become law by default, unless the Legislature approves, disapproves, or amends the rules within the 90 days, OR the rules are disapproved upon adjournment with no appointed date for action. 5 GCA § 9303(c).



DRAFTING TIPS



Write rules for your audience:

Rules apply to members of the public.

Everyone should be able to read and understand your rules without hiring a lawyer.

Terminology Basics:

1. Define any words that have a special meaning and that will be used many times in your Rules.

Example: If your rules will use the word "Operator," make sure that there is a definition of who is an "Operator" at the beginning of your rules.

Terminology Basics:

2. Use terms consistently throughout the rules, and don't use synonyms or different words to mean the same thing.

Example: If you start out using the word "lavatory," don't switch later in the rules to "bathroom."

Terminology Basics:

3. Don't use similar words to mean the different things.

Example: Don't use "automobile" and "motor vehicle" to mean two different things.

Terminology Basics:

4. Don't use big words that sound fancy.

Example: Say "use" and not "utilize."

Terminology Basics:

5. Avoid long sentences.

Example: “Operators may utilize transport conveyances, provided that such transport conveyances have first been duly registered with the appropriate agency within the executive branch of the government of Guam.”

Vs.

“All Drivers shall register their vehicles at the Motor Vehicle Division of the Guam Department of Revenue and Taxation.”

Terminology Basics:

6. Use the “active” voice.

Example:

“The Director shall examine the application.”

Vs.

“The application must be examined by the Director.”

Terminology Basics:

7. Use exact numbers (especially for fees).

Example:

"Fees for vehicle registrations shall be set in an amount not less than \$50.00, but not exceeding \$1000.00."

Vs.

"The vehicle registration fee for a vehicle is \$200.00."

Terminology Basics:

8. Punctuation matters!

Example: "Let's eat grandpa."
 Vs.
 "Let's eat, grandpa."

ANY QUESTIONS

